



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2011

Mr. William C. Ferebee
City Attorney
City of Shenandoah
29955 IH-45 North
Shenandoah, Texas 77381

OR2011-07109

Dear Mr. Ferebee:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 417989 (City RR 2011-006).

The City of Shenandoah (the "city") received a request for information pertaining to a named city police officer and a specified incident involving a named individual. You claim that the requested information is excepted from disclosure under sections 552.102, 552.108, 552.117, and 552.119 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We first address your argument under section 552.108 of the Government Code as it is potentially the most encompassing. Section 552.108 provides in part:

¹Although you also raise section 552.024 of the Government Code as an exception to disclosure, this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain personal information relating to the official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024.

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution; [or]

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2), (b)(1)-(2). Section 552.108 protects certain specific types of law enforcement information. Section 552.108(a)(1) is applicable if release of the information would interfere with a pending criminal investigation or prosecution. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Section 552.108(b)(1) protects internal records of a law enforcement agency whose release would interfere with law enforcement and crime prevention. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). Sections 552.108(a)(2) and 552.108(b)(2) are applicable only if the information at issue relates to a concluded case that did not result in a conviction or a deferred adjudication. A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See Gov't Code § 552.301(e)(1)(A); Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

Although you generally assert the submitted information is excepted under section 552.108, you have not specified the subsection of section 552.108 that applies to the information, nor

have you submitted any specific arguments explaining how that subsection applies to the information. *See* Gov't Code § 552.301(e)(1)(A) (stating it is governmental body's burden to establish applicability of claimed exception or otherwise explain why requested information should not be released). Consequently, we find you have failed to establish the applicability of section 552.108 of the Government Code to the submitted information. Therefore, the city may not withhold any of the submitted information on the basis of section 552.108.

We note the submitted information contains I-9 forms. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 1324a of title 8 of the United States Code. Section 1324a provides that an Employment Eligibility Verification Form I-9 and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Accordingly, the city must withhold the I-9 forms we have marked under 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

We also note the submitted information contains W-4 forms that are confidential under federal law. Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Accordingly, the city must withhold the W-4 forms we have marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *See id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find that some of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Thus, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the remaining information, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure. *See* Gov't Code § 552.117(a)(2); Open Records Decision No. 622 (1994). We note section 552.117(a)(2) encompasses a peace officer's personal cellular telephone and pager numbers if the officer personally pays for the cellular or pager service. *See* Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1998) (Gov't Code § 552.117 not applicable to cellular mobile telephone numbers paid for by governmental body and intended for official use). Accordingly, the city must withhold the information we have marked under section 552.117(a)(2); however, the city may only withhold the marked personal cellular telephone numbers under section 552.117 (a)(2) if the officer at issue paid for the cellular telephone service.

We note that the submitted information may include information subject to section 552.1175 of the Government Code, which provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). We have marked addresses and telephone numbers that may be the home addresses and telephone numbers of licensed peace officers not employed by the city. The city must withhold the information we marked only if it consists of the home addresses and telephone numbers of licensed peace officers and the peace officers elect to restrict access to the information pertaining to them in accordance with section 552.1175(b). If the information does not consist of the home addresses and telephone numbers of peace officers not employed by the city or no elections are made, the city may not withhold the information we have marked under section 552.1175.

Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. *See id.* § 552.130(a)(1), (2). We note, however, section 552.130 protects privacy interests. In this instance, the requestor may be an authorized representative of one of the individuals whose Texas motor vehicle record information is at issue. Thus, the requestor may have a right of access under section 552.023 to the that individual's Texas motor vehicle record information. *Id.* § 552.023(b) (governmental body may not deny access to person or person's representative to whom information relates on grounds information is considered confidential under privacy principles). If the requestor is an authorized representative of this individual, then he has a right of access under section 552.023 to this individual's information and it may not be withheld from him under section 552.130. If the requestor is not an authorized representative of the individual, then this information must be withheld

under section 552.130. The remaining marked information must be withheld under section 552.130.³

We note a portion of the remaining information is subject to section 552.136 of the Government Code. Section 552.136 states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. Accordingly, we find the city must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the following: (1) section 1324a of title 8 of the United States Code; (2) section 6103(a) of title 26 of the United States Code; and (3) common-law privacy. The city must withhold the information we have marked under section 552.102(a) of the Government Code. The city must withhold the information we have marked under section 552.117(a)(2) of the Government Code, however, the city may only withhold the marked personal cellular telephone numbers under section 552.117(a)(2) if the officer at issue paid for the cellular telephone service. The city must withhold the information we marked under section 552.1175 of the Government Code, if this information consists of the home addresses and telephone numbers of licensed peace officers and the peace officers elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code. If the requestor is not the authorized representative of the individual whose Texas motor vehicle record information we have marked, the city must withhold the marked information under section 552.130 of the Government Code. The city must withhold the remaining information we have marked under section 552.130 of the Government Code. The city must withhold the insurance policy number we have marked under section 552.136 of the Government Code.⁴ The remaining information must be released.

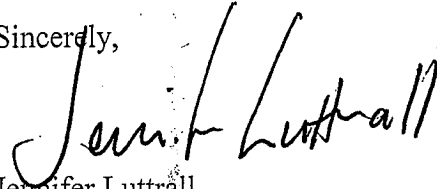
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

³As our ruling on this information is dispositive, we do not address your argument to withhold this information under section 552.119 of the Government Code.

⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: a Form I-9 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; a W-4 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; a Texas driver's license number under section 552.130 of the Government Code; and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer Luttrall". The signature is fluid and cursive, with the first name "Jennifer" written in a larger, more prominent script than the last name "Luttrall".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/bs

Ref: ID# 417989

Enc. Submitted documents

c: Requestor
(w/o enclosures)